United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

75-1178

To be argued by
HOWARD F. CERNY

B
P/S

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

FRANK CLARK, III,

Defendant-Appellant.

PETITION FOR REHEARING

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PETITION FOR REHEARING

75-1178

APPELLANT'S PETITION FOR A REHEARING

To the Honorable Judges, Gurfein, VanGraafeland, and Meskill, Judges of the United States Court of Appeals for the Second Circuit:

Comes now the Appellant in the above-entitled case and respectfully prays the Court to grant a rehearing.

1. There are three principal questions argued on this rehearing, did the trial judge adequately charge and instruct the jury as to the defendant's actual knowledge of the theft and did this Court ("the panel") properly review that question, was the trial court's "Allan charge" correct and was the panel's affirmance of that charge correct?

2. Did the United States Government's prosecution of this case violate the principle's of federalism and state's rights, i.e. should this prosecution have been properly left to the State of New York?

3. The defendant was found guilty of a violation of 18 U. S. C. Section 2314, in that he willfully and knowingly transported in interstate commerce a diamond, the value of which exceeded $5,000. This petition will not review all of the actual facts concerned, other than those necessary to explain the reasons and the necessity for a petition for a rehearing.

4. The defendant-appellant-petitioner represented himself at the time of the trial. He conceded that the ring in question was valued in excess of $5,000 and that he did transport it on the date in question between Vermont and New York. The issues tried and the issues submitted to the jury consisted of whether or not the defendant knew that the diamond ring in question had previously been stolen and, in fact, whether the ring itself had been stolen.

5. The panel, in its opinion, stated the following facts as to be indicia of knowledge of theft:

> "1) the purchase of expensive diamonds was not a regular occurrence in appellant's life; yet he claims to have bought the ring for $20,000 from one who was not a jeweler without having it appraised;
>
> 2) the price appellant assertedly paid for the ring was substantially below its market value;
>
> 3) the price paid was not commensurate with the appellant's reported income;

4) there was no documenatry evidence to support either the purchase or the payment of the purchase price;

5) in May 1972, appellant testified on a deposition in an unrelated matrimonial matter that he had little or no money;

6) in a subsequent deposition in September 1972, appellant testified that he had purchased no rings for his fiancee, which is contrary to his present claim concerning the stolen ring;

7) during the twenty months that the ring was in appellant's possession, he had it examined by jewelers in such widely scattered cities as Boston, Philadelphia, San Francisco, Palm Springs, Atlanta and Bennington, and learned from several of these jewelers that the ring was worth at least $50,000;

8) appellant had a new jacket or protective mounting made in Bennington, at which time he told the jeweler that he had purchased the diamond six or seven years earlier from a salesman for DeBeers Consolidated Mines, Ltd.;

9) upon learning that the FBI was on the trail of the stolen ring, appellant attempted to retrieve it from the jeweler, to whom he had delivered it for purposes of sale, before it could be seized by the Government."

6. The panel after reciting the above indicia of knowledge quoted several cases they felt controlled the issue in point, i.e. did the defendant know the ring was stolen when he transported in interstate commerce. However, the cases cited; United States v. Brawer, 482 F2d 117; United States v. Jacobs, 475 F2d 270, are not on point nor

do they support the panel's conclusion. Those cases involved the theft of U. S. Treasury Bills with a stated face value, and the defendants had paid much less than the face value. These wind fall profits were held to be sufficient knowledge to the defendant that the Treasury Bills had in fact been stolen. The third case relied on by the panel, United States v. DeKunchak, 467 F2d 432, involved the possession and transportation of five drums of vitamin B-12. In this case the unexplained possession was supported by the fact that the defendant was familiar with the purchaser and knew that he trafficked in stolen goods. In addition, there was a history of surreptitius interstate transfer of the drums in question. In the first two cases, the face amounts of the Treasury Bills were clearly evident to the defendant, who purchased or would have sold them for less than their face value. In the third case, the ownership of the vitamin B-12 drums were clearly indicated and the defendant had knowledge as to whom he was dealing with.

7. In this instant case, the defendant purchased a diamond ring for $20,000, the fact that it was worth in access of $20,000 is not an indicia of theft. The trial court charged, and the panel approved, that since the defendant was an attorney he could not be accused of naivety or negligence. However, being an attorney does not per se make one an expert in the price or value of a diamond ring. In this

instance, the defendant paid a substantial value for a ring that he accepted from a third party. This Court should ask itself a simple question; if they purchased a diamond ring, would they be charged with knowledge of the actual value, or merely the fact that they paid a substantial amount of money?

The defendant is also charged with the fact that no documentary evidence was submitted to support the purchase or payment of the ring. There was no evidence introduced that the state of Florida required such a paper or other documentation to purchase a piece of personal property. Certainly, in the state of New York, there is no such requirement.

8. The Court permitted the use of the defendant's testimony in a matrimonial action as an admission. Certainly this Court is sophisticated enough to realize that the questions and answers given in an examination before trial, during a pending matrimonial, do not necessarily reflect the true state of the defendants finances.

9. The panel then assigns, as another indicia of knowledge that the defendant had the ring examined in Boston, Philadelphia, San Francisco, Palm Springs, Atlanta, and Bennington. The panel then uses this exposure as an indicia of fraud, whereas in cases cited by the panel it would have been an indicia of fraud to conceal the ownership and possession of the ring.

10. The jury apparently felt that there was a strong issue of fact as to whether the defendant knew that the diamond ring had been previously stolen. They, at several times, requested clarification from the Court; the response by the Court was quite unsatisfactory. It is clear, from the trial record, that the jury had severe doubts as to whether or not the defendant had knowledge that the ring had been previously stolen. The Court's merely reciting its prior charge did not correct this impression nor enlighten the jury as to the proper circumstances involved. This Court, in the case of United States v. Bright, F2d (decided May 21, 1975), 17 CRL 2236, has stated that the element of the crime must be knowledge of theft.

11. The trial court, with the concurrence of the panel, correctly charged that recent possession of an item previously stolen as being prima-facia knowledge of the fact that it was stolen. However, in this case, the defendant gave an adequate explanation as to his recent possession. Further, the Court charged and the panel concurred, that where an item is closely guarded and secured, its absence indicates a theft. The record clearly shows that the ring was missing in approximately May, the store from which it was allegedly stolen did not discover the theft until several months later.

This is hardly the close security and guardianship that would imply an inference of theft. It is equally obvious that the ring may have been misplaced or even sold, in which case an essential element of the crime would be lacking.

12. The trial court, with the concurrence of the panel, gave the "recent possession charge" in aid of the Government's case. The panel stated in its opinion,

> "it would, of course, have been impossible for appellant to know that the ring was stolen if, in fact, it had not been."

This merely begs the question. It was the Government's burden to show that the ring had actually been stolen and that the defendant knew that it had been stolen. To reverse the panel's own reasoning, if the appellant knew that the ring was not stolen, then it was in fact not stolen. The logic of both sentences escapes the writer, especially, in relation to the conviction of an attorney for possession of a stolen ring.

13. The presumption charge itself is a boot-strapping technique used by the Government and, unfortunately, normally condoned by our Courts. However, one eminent judge has condemned the recent possession charge as being unconstitutional. In the case of Commonwealth v. Turner, Pennsylvania Supreme Court, 15 CRL 2096, Justice Roberts characterized the inference as being unconstitutional for its

failure to satisfy the reasonable doubt standard. Although his brethren on the Court did not agree on the constitutional point, they did reverse the case on the grounds that recent possession could no longer prove a specific element of a crime:

> "the advent of densly populated communities, revolutionary advances in communication and transportation, the increased mobility which produced a more transient patent of living for large segments of our society and the myriad of other changes in the nature and character of our society have combined to create the need to redefine the term 'recent possession'..."

The same Court further stated:

> "whether in the light of present day experience the proven fact bears sufficient relationship to the fact to be inferred; and whether the rational connection inherent in the inference is of such nature that a standardization is desireable."

The Court concluded that the recent possession charge was illusory and had no real bearing on the facts in issue. The Court went on to say that the charge merely confused the jury and facilitated an opposite result than that intended. The Court stated that it would have been better for the Commonwealth to have proven the actual larceny by evidence other than recent possession.

14. As stated above, the jury was confused, unsure and unconvinced of the evidence of actual knowledge of theft prior to its movement in

interstate commerce. The jury retired after charge at approximately 12:30. They returned with several questions and finally at 6:15 specifically requested the judge to recharge on the question of knowledge. The judge recharged, improperly, the charge he had previously given the jury. Prior to this request, the judge had also given an "Allen charge". The panel concurred on, what it termed, a modified Allen charge.

The Allen charge as given by the trial court and concurred in by the panel was in error, and extremely prejudicial to the defendant. The Court improperly charged the jury and stressed to the jury not the importance of the case as between the Government and the defendant, but the cost of the case to the Government. Since the jury are normal tax-paying members of our society, this stress by the Court as to the cost of this trial was highly improper and prejudicial to the defendant. While an Allen charge may be properly given to a jury under certain circumstances, any use of the charge must be carefully worded and the jury must be instructed that it does not represent the Court's opinion or should it supercede the jury's own decision. When a monitary element is added and impressed upon the jury, this violates even what must be considered a modified Allen charge. United States v. Zane, 495 F2d 683.

15. The defendant stands convicted of a federal crime, the federal jurisdictional element, being interstate commerce. The facts are clear that the ring, if in fact is was stolen, was stolen in Texas. The defendant testified and there is no evidence contrary, that he purchased the ring, in good faith, in Florida some time later. However, the jurisdictional element, i. e. the interstate transportation, was from Vermont to New York some several years later. What is the United States Government's compelling interest in this case?

The writer need hardly remind this Court as to the overburdened calendar in both the Eastern and Southern districts and its resulting burden on this Court of Appeals. Our country is divided into various political subdivisions, the primary being the federal Government and the state Governments. Although it may have been of compelling federal interest at one time to enact various legislation giving the federal Government jurisdiction over what normally would have been state crimes, by use of the ICC clause, this Court and all courts should take into consideration whether that compelling interest still remains.

This Court has recently expressed in unequivical terms the relationship between a state and a federal crime. United States v. Bell, F2d , (NYLJ, October 21, 1975).

What compelling nexus existed between the possession of an alleged stolen ring in New York and the United States Government? This case and the defendant's subsequent conviction arose out of no interest of the United States Government other than the fact that the Federal Bureau of Investigation was first notified. Had the Bureau, as they should have, merely turned over the information to the local police authorities, this case would have never been tried in a federal court nor would it be before this honorable tribunial at this point. There exists in New York a very clear and specific penal law against possession of stolen property. New York State had the controlling and compelling interest in this prosecution. The ring was allegedly created and sold in New York. The defendant is alleged to have illegally possessed it in New York. The fact that it may have moved from Texas to Florida, from Florida to Vermont and various other states does not create a controlling interest in the United States Government. The alleged victims interest could have been vindicated by a trial in New York State.

In a case such as this, where the question of guilt or innocence so confused the jury, that they repeatedly asked questions concerning the defendant's prior knowledge, its interstate nexus and the defendant's responsibility, should have certainly been tried in a state court rather than in the federal court. This court should

follow the judicial philosophy it stated in United States v. Bell, supra, and by doing so, inform the federal law enforcement authorities that it will no longer tollerate, hyper-technical violations of federal law. Federal law enforcement authorities should be concerned with specific breaches of federal law, i. e. those violations that actually had an effect on the United States Government or where there is no local penal law controlling.

Essentially, this petition for rearguement is based on a very simple ground. The defendant may have been foolish, negligent or naive, but he was not a criminal. "Guilty knowledge cannot be established by demonstrating merely negligence or even foolishness upon the part of the defendant." United States v. Bright, supra.

WHEREFORE, defendant-petitioner respectfully requests this Court permit a rehearing and rearguement of the Court's prior opinion.

DATED: New York, New York
December 15, 1975

Respectfully submitted,

HOWARD F CERNY
Attorney for Defendant
Office and P. O. Address:
345 Park Avenue
New York, New York
Tel. No. (212) 688-0700

CERTIFICATE OF COUNSEL

I, JOHN T. McDONALD, being one of the attorneys for the appellant, certify that this petition is presented in good faith, that it is not interposed for delay, and that in my judgment it is well founded.

DATED: New York, New York
December 15, 1975

JOHN T. McDONALD

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- *against* -

FRANK CLARK ~~XXX~~ III,

Defendant-Appellant

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Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 W. 146th St., New York, N.Y.

That on the 17th *day of* Dec *19* 75 *at* 1 St. Andrews Pl., N.Y., N.Y.

deponent served the annexed Petition for Rehearing *upon*

U.S. Attorney So. District of N.Y.

the attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* attorney *herein,*

Sworn to before me, this 17 *day of* Dec *19* 75

Robert T. Brin

James A. Steele
JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1977